Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

JESUS MANUEL FRIAS-MUNOZ,

Petitioner,

v.

MADELINE K. ALBRIGHT,
Secretary of State of the United States,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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25pp

QUESTION PRESENTED

Whether the doctrine of invited error, as laid out in *United States v. Cain*, 130 F. 3d 381, 383 (9th Cir. 1997) *cert. denied*, 118 S. Ct. 1333 (1998), permits a United States citizen to be denied his citizenship, and deported from the United States on the basis of illegally admitted hearsay evidence, or does the decision of this very court in *United States v. Olano*, 507 U.S. 725; 113 S. Ct. 1770; 123 L. Ed. 2d 508 guarantee that United States citizenship is protected by the Constitutionally guaranteed right to due process of law.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Jesus Manuel Frias-Munoz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. *infra* 1a-2a) affirming the district court's judgment was filed on July 27, 1998. It was not reported. On February 17, 1999 the court of appeals denied petitioner's motion for rehearing.

JURISDICTION

The court of appeals entered its judgment on February 17, 1999. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1401(a)(7) controls whether the petitioner in this case is a United States citizen.

STATEMENT

A. THE PETITIONER IS A UNITED STATES CITIZEN

Jesus Frias-Munoz, the petitioner in this case, is a citizen of the United States. Although born in Mexico, he moved to the United States when he was a teenager and has resided here since that time. He is married to a United States citizen and is the father of three children who are natural born citizens of the United States.

His father, Juan de la Cruz Frias, was a natural born citizen of the United States, having been born in Arizona in 1917. Frias-Munoz was born in Mexico in 1954 of a Mexican mother and his U.S. citizen father.

At the time of his birth, the law controlling U.S. citizenship provided that the children of U.S. citizens who were married to non-United States citizens were citizens if their U.S. citizen parent had actually resided in the United States for ten years, five of which were after attaining age 16.[1]

---

[1] See 8 U.S.C. § 1401(a)(7) "The following shall be . . . citizens of the United States at birth:. . . . a person born outside the geographic limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person was physically present in the United States . . . for a period or periods totally not less than ten years, at least five of which were after attaining the age of fourteen years. . . . " The statute was amended to its current form in 1986 which substituted "five years, at least two" for "ten years, at least five". Had this substitution been in effect the day petitioner was born there would be no question about his citizenship.

Several years ago Frias-Munoz became involved in a transaction which dealt with the possession and distribution of illegal substances. Although no illegal substances were ever possessed or distributed, Frias-Munoz was arrested, convicted at a jury trial, and sentenced to 5 years in state prison, a sentence which he served. Currently the United States Department of Justice is attempting to deport Frias-Munoz because of his involvement in this plot.

B. PROCEEDINGS BELOW

This action was brought in United States District Court for the Central District of California, Western Division, as a writ of mandamus to compel the respondent to issue a United States passport to the petitioner. (By issuing the passport the U.S. Department of State would recognize the citizenship of Jesus Munoz-Frias.)

The petitioner attained U.S. citizenship through his father, Juan de la Cruz Frias, who was a native born U.S. citizen. Since the respondent's mother was a Mexican national and the respondent was born in Mexico, he only became a United States citizen at birth if (as mentioned above in footnote one) his United States citizen parent had actually resided in the United States for ten years, five of which occurred after the United States citizen parent had attained the age of 16.

At trial the petitioner lost largely due to an error by his then counsel who failed to object to the admission of a document into evidence. The document was an affidavit signed by Juan de la Cruz Frias which stated that although born in the United States he relocated to Mexico

while still a young boy and never returned to the United States. This document was demonstrably false, it was prejudicial to the interests of the petitioner, and it was hearsay, not within any exception to the hearsay rule, and as such had trial counsel objected to its admission it would have been excluded.

The petitioner then appealed to the United States Court of Appeals for the Ninth Circuit which held that (1) the petitioner, by his counsel, intentionally relinquished his right to object to the admission to the evidence at issue in the case; (2) because the alleged error was invited by petitioner it cannot be raised on appeal; and (3) that only forfeited rights are reviewable for plain error, while waived rights are not subject to appeal. (See Appendix A for copy of decision.)

REASONS FOR GRANTING THE PETITION

There is a significant conflict between the Ninth Circuit's opinion and this court contained in *United States v. Olano*.[2] At the district court level conflicting decisions are proliferating rapidly in the Ninth Circuit, as well as the other circuits, and the need for guidance from this court is acute. This case is a timely and rare opportunity for this court to provide that guidance, because there are systemic reasons why few of the district court decisions receive appellate review. Moreover, the decision below is clearly erroneous and the issue it addresses is important. A United States citizen should not be stripped of his

[2] 507 U.S. 725, 113 S. Ct. 1770; 123 L. Ed. 2d 508 (1993).

citizenship and deported in a trial tainted by the admission of hearsay evidence.

I. The Court Of Appeals' Application Of The Doctrine Of Invited Error Misinterprets The Rule Stated By This Court In *United States v. Olano* And Results In An Unconstitutional Application Of The Waiver Doctrine.

The level of error necessary to trigger the doctrine of invited error requires a willful decision on the part of trial counsel to waive a right. The Court of Appeals for the Ninth Circuit failed to distinguish between forfeiture, or failure to object to an erroneous decision of the trial court, and the intentional relinquishment of a right.

II. The Decision Of The Court Of Appeals Is Erroneous

Reviewing the decisional law reveals this to be true. The Court of Appeals for the Ninth Circuit has stated, in *United States v. Perez*, 116 F. 3d 840, that:

> We have held repeatedly that where the defendant himself proposes allegedly flawed jury instructions, we deny review under the invited error doctrine. See, e.g., *United States v. Butler, 74 F.3d 916, 918 n.1 (9th Cir. 1996); United States v. Staufer, 38 F.3d 1103, 1109 n.4 (9th Cir. 1994); United States v. Baldwin, 987 F.2d 1432, 1437* (9th Cir.), cert. denied, *508 U.S. 967, 124 L. Ed. 2d 696, 113 S. Ct. 2948 (1993); United States v. Guthrie, 931 F.2d 564, 567 (9th Cir. 1991).* The doctrine reflects the policy that invited errors "are less worthy of consideration than those where the defendant merely fails to object." *Guam v.*

> *Alvarez, 763 F.2d 1036, 1037 (9th Cir. 1985).* In the past, we have corrected invited errors only in extraordinary circumstances, such as "when the integrity of the judicial process itself would otherwise suffer." Id. (quoting *Marshall v. United States, 409 F.2d 925, 927 (9th Cir. 1969)*; but see, *United States v. Freeman, 6 F.3d 586, 600 (9th Cir. 1993)* (conducting a plain error review of the omission of an entrapment instruction, even though the defendant had voluntarily withdrawn such an instruction at trial). The government argues that under our invited error doctrine, we may not review the error because Cruz and Perez both proposed the faulty instructions to the court.

In this case the petitioner did not personally know of the waiver of his rights, and the waiver was not intentionally made. Rather his attorney failed, in error to make a timely objection to the admission of hearsay evidence. According to the Ninth Circuit's own decisional law this is not an "invited error" situation. The decisional law of this court is in agreement.

In order to reach the level of the doctrine of invited error it is necessary that there be more than the mere failure to object to the admission of a piece of evidence. In *Perez* both defendants submitted the flawed jury instructions. But it is clear from the record that neither the petitioner, nor the respondent, or even the court itself, was aware of the error. This fact is similar to the present case where the petitioner, through his attorney, wanted to exclude the proffered affidavit of petitioner's father, but was not aware that the document itself was hearsay not within any exception to the hearsay rule. The petitioner was not guilty of intentionally relinquishing his right to a

fair trial; rather, his attorney was guilty of negligently failing to notice that the affidavit was hearsay not covered by any exception to the hearsay rule.

In order to determine whether the doctrine of Waived Rights applies or whether the doctrine of Plain Error applies, the Court must determine whether the party himself was aware that he was waiving or affirmatively relinquishing a known right.

This is how the Ninth Circuit Court of Appeals viewed the same issue in *United States v. Cain*, 130 F.3d 281:

> The principal issue before us is how we classify the alleged error. The government argues any error was waived and thus unreviewable. See *United States v. Perez, 116 F.3d 840, 844 (9th Cir. 1997)* (en banc) (Perez). In addition, the government argues that even if not waived, any forfeited error should be reviewed under our plain error analysis. See *id.* Cain contends that plain error analysis is appropriate.
>
> In *Perez*, we held that a defendant did not waive his objection to a jury instruction when he submitted an instruction which followed the Manual of Model Criminal Jury Instructions for the Ninth Circuit, but which did not reflect the requirement of a recent case, of which both parties' counsel and the court were unaware. *Id. at 845-46.* We applied plain error analysis because there was "no evidence that [the defendants] affirmatively acted to relinquish a known right." *Id. at 845.*

This passage is particularly significant in this case. Unless there is evidence of knowledge of the fact that the

proffered evidence was hearsay, the Court should not have found, as a matter of law, that the petitioner knowingly waived his rights. The extreme penalty laid out by dint of the application of the doctrine of Waived Rights cannot apply unless the party seeking to impose this rule can show that the failure to object to the questioned item was, in fact, knowingly and willfully made.

Returning to the decision of the court:

> Here, it can be argued that Cain was not personally aware of the defect, and that would not be surprising as there is no indication he has been trained in the law. However, "we have long held that jury instructions may be waived by a defendant's attorney." *Id. at 845 n.7*, citing *United States v. Staufer, 38 F.3d 1103, 1109 n.4 (9th Cir. 1994)*.
>
> Cain's attorney's signature clearly appears on the joint request for proposed instructions. In the joint request, both he and opposing counsel wrote that they "respectfully request that the court include the attached instructions in its charge to the jury. The instructions are submitted in the sequence in which the government and defendant propose that they be read to the jury." There is no dispute that both counsel signed and filed the proposed instructions request. Both parties are, therefore, responsible for them and must bear the legal consequences.
>
> We cannot accept the proposition that the defense lawyer's signature on the jointly proposed instructions was a meaningless or perfunctory formality. Rather, Cain's attorney,

> through his signature and joint filing, represented to the court that he had read the instructions, that he had studied them, and that, to the best of his knowledge, they represented the current state of the law. When an attorney signs a jury instruction proposal, he certifies to the court, as an officer of that court, that the instructions are legally correct. In other contexts, we have recognized that an attorney's signature carries great legal consequences. See, e.g., *In re Rainbow Magazine, Inc., 77 F.3d 278, 282-83 (9th Cir. 1996)* (attorney's signature renders attorney and client sanctionable for filing bad-faith papers in bankruptcy court); *Giebelhaus v. Spindrift Yachts, 938 F.2d 962, 964-66 & n.2 (9th Cir. 1991)* (applying Rule 11 sanctions only to lawyers who actually sign pleadings and requiring actual signature, not mere typewritten name). We therefore apply the waiver analysis of Perez to action and inaction of Cain's attorney.

Again, clearly the actions of an attorney trained in law are held to a standard higher than the standard which is applied to the party in the action himself. But the standard is not absolute. Because an attorney has signed an agreement which waives an important right of his client, the decisional law does not deny said attorney the right to argue that he made a mistake. This is true in this case. Trial counsel admits that he was not aware that the proffered document was hearsay not within any exception to the hearsay rule.

The court continued:

> Like Staufer's counsel, Cain's counsel "proposed the instruction to which he now objects" and the basis for his challenge, the Ninth Circuit

> model instruction and our case law supporting it, "was already on the books." See Ninth Circuit Model Criminal Jury Instruction § 3.16; *United States v. Smith, 962 F.2d 923, 929 (9th Cir. 1992); United States v. Penagos, 823 F.2d 346, 350 (9th Cir. 1987).* Like Staufer's modified instruction, Cain's proposed jury instruction itself rebuts any claim of ignorance – Cain's instruction cited to the model instruction he now contends he ignorantly disregarded. It is no answer "merely [to assert] he did not know the instructions were flawed." *Perez, 116 F.3d at 845.*
>
> Staufer, which explicitly survives Perez, controls here. There is "evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right." *Perez, 116 F.3d at 845.* Like Staufer, Cain waived his objection to the jury instruction on possession.

But in this case there is no evidence in the record that either the counsel or the petitioner himself was aware of the mistake. In this case the record shows that the petitioner, through his attorney had the opportunity to object to the proffered evidence, but that he failed to object in a timely manner. This fact is the key to understanding this petition for certiorari. It is the failure of the Ninth Circuit Court of Appeals to recognize and to deal with this problem which causes their decision to fly in the face of accepted Ninth Circuit law, and to also contradict established Supreme Court decisions. It is necessary for the court to grant this writ of certiorari to correct the law in this case to conform with the Supreme Court's mandate that "[t]he principal utility of determinations by the Court of Appeals en banc is to enable the Court to maintain its integrity as an institution by making it possible

for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court."[3]

In *Olano*, the Supreme Court goes to great length to distinguish between the meanings of the various doctrines at issue in this case. We can learn a great deal from reviewing what was said:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)*; see, e.g., *Freytag v. Commissioner, 501 U.S. 868, 894, n. 2, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991)* (SCALIA, J., concurring in part and concurring in judgment) (distinguishing between "waiver" and "forfeiture"); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, *126 U. Pa. L. Rev. 473, 474-477 (1978)* (same); Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, *75 Mich. L. Rev. 1214, 1214-1215 (1977)* (same). Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice

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[3] (See *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-90, 80 S. Ct. 1336, 4 L. Ed. 2d 1491 (1960); see also *Textile Mills Sec. Corp., v. Commissioner*, 314 U.S. 326, 334-335, 62 S. Ct. 272, 86 L. Ed. 249 (1941).)

must be particularly informed or voluntary, all depend on the right at stake. See, e.g., 2 W. LaFave & J. Israel, Criminal Procedure § 11.6 (1984) (allocation of authority between defendant and counsel); Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, *55 Texas L. Rev. 193 (1977)* (waivability and standards for waiver). Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). Although in theory it could be argued that "if the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review," Orfield, The Scope of Appeal in Criminal Cases, *84 U. Pa. L. Rev. 825, 840 (1936)*, this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

III. The Question Presented Is Important

Over and over the facts in this case simply refuse to be categorized as falling under the doctrine of Waived Rights. "Choices" we are told must be "voluntary" or minimally "particularly informed." The standard to be applied must be based on the "right at stake." In our case the "right at stake" is the right to live in this country with one's family as an American citizen. Our citizenship is perhaps our most basic right. (See *Dred Scott v. Sandford*, 19 Howard (60 U.S.) 393. 15 L. Ed. 691 (1856).) The Supreme Court also tells us that "certain procedures" must be followed before a right may be waived. These

procedures were not followed in this case. The Panel never addresses this point in their decision.

In this case the petitioner merely failed to make a timely assertion of his rights. He did not, either personally, or through his attorney, intentionally relinquish his rights. Any review of *Olano* would reveal that he needed to do more than he did to fall under the doctrine of Waived Rights.

There is a very high standard for the party seeking a writ of certiorari by the Supreme Court to review a decision of the Ninth Circuit Court of Appeals. The standard of review is met in this case because, the decision is clearly violative of the Supreme Court decision in *Olano*. This Court has to maintain the uniformity of its decision, and to ensure that its decisions comply with its controlling decisions.

The decision of the Supreme Court in *Olano* clearly sets out standards of behavior which must be met before the courts may impose the extreme sanctions contained in the doctrine of Waived Rights. In addition to being contra to the decision in *Olano*, the decision of the Ninth Circuit Court of Appeals is violative of Ninth Circuit decisions such as *Perez* and *Cain*. The doctrine of Waived Rights is most properly applied in cases where an act is taken intentionally as a matter of trial tactics. "We will not object to the introduction of a piece of evidence in the belief that it may influence the jury to decide in our favor. And then, after losing the case, we can appeal the decision based on the evidence we intentionally let in." In this situation the doctrine of Waived Rights makes perfect

sense. A man may not murder his parents and then plead for mercy because he is an orphan.

In our case the petitioner failed to object in a timely manner because he, and his attorney, failed to recognize that a certain piece of evidence was not admissible. The act was not done as a trial tactic to win the case. This failure to act was not the result of an intent to preserve this issue as a grounds to wage an appeal of an adverse decision. The failure to object to the affidavit of Juan de la Cruz Frias was the result of the failure of the trial attorney to recognize that the proffered piece of evidence was inadmissible hearsay.

The facts in this case call out for reversal. The petitioner is a middle-aged man who is employed in a useful business, and is married to a natural born American citizen and is the father of four teenage children who need the presence of their father. He made one serious mistake and has suffered grievously for this mistake. The state has the power to destroy his life, and the lives of his innocent children, who will be denied the support of their father during perhaps the most important years of their childhood years.

The state has the power to destroy the life of the petitioner. But if you are going to do this at least give us a fair trial conducted according to the rules of evidence and not weighted down with inadmissible hearsay evidence. This is the minimal right all persons are entitled to under our system of laws.

CONCLUSION

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the Honorable United States District Court for the Central District of California, Western Division, and to the Honorable Richard A. Paez, Judge of said Court, requiring said Honorable Richard A. Paez, to order respondent to issue petitioner a United States passport.

2. That petitioner have such additional relief and process as this Honorable Court may find be necessary and appropriate in this case.

Dated: March 17, 1999

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESUS MANUEL FRIAS-MUNOZ, Plaintiff-Appellant, v. MADELEINE K. ALBRIGHT, Secretary of State of the USA, Defendant-Appellee.	No. 97-56039 D.C. No. CV-95-06968-RAP MEMORANDUM* (Filed Jul. 27, 1998)

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Submitted July 20, 1998**

Before: HUG, Chief Judge, SCHROEDER and KOZINSKI, Circuit Judges.

Jesus Manuel Frias-Munoz appeals an evidentiary ruling by the district court in his 8 U.S.C. § 1401(g) action seeking declaratory judgment of United States citizenship. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. The request for oral argument made by Frias-Munoz is therefore denied.

Frias-Munoz, by counsel, intentionally relinquished his right to object to the admission of the document at issue in this appeal. *See United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997) (signature of attorney on joint filing carries legal consequences sufficient to support waiver), *cert. denied*, 118 S. Ct. 1333 (1998). Accordingly, because the alleged error was invited by Frias-Munoz, it cannot be raised on appeal. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) ("Forfeited rights are reviewable for plain error, while waived rights are not.").

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – APPEALS

Case No. CV95-6968-RAP

U.S.C.C.A. Case No.: 97-56039 Date: March 4, 1999
Title: Jesus Manuel Frias-Munoz v. Madeline K. Albright, Sec. Of State

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PRESENT: THE HONORABLE JUDGE

Courtroom Clerk Court Reporter

ATTORNEYS FOR PLAINTIFFS: ATTORNEYS FOR DEFENDANTS:

PROCEEDINGS: FILING AND SPREADING MANDATE ON THE NINTH CIRCUIT COURT OF APPEALS

__ IN COURT X IN CHAMBERS

X COUNSEL NOTIFIED (No hearing necessary)

THE COURT ORDERS that the mandate of the Ninth Circuit Court of Appeals:

X Affirming __ Remanding __ Reversing and Remanding

__ Affirming in part, reversing in part __ Dismissing Appeal

__ The record reflects that costs of the prevailing party were taxed by Ninth Circuit Court of Appeals in the amount of:

$_____ on _____.

__ Other: _____

is hereby filed and spread upon the minutes of this District Court.

__ The Case is set for further proceeding as to _____:

on _____ at _____.

__ MAKE JS-5

Initials of Deputy Clerk __

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-56039
CT/AG#: CV-95-06968-RAP

JESUS MANUEL FRIAS-MUNOZ

Plaintiff-Appellant

v.

MADELEINE K. ALBRIGHT, Secretary of State of the USA

Defendant-Appellee

(Filed Mar. 4, 1999)

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered: July 27, 1998